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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

IN THE MATTER OF CLEANUP AND ABATEMENT ORDER NO. R5-2005-0141 OF CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD FOR THE CENTRAL VALLEY REGION.	**CASE NO.** _____ **PETITION FOR REVIEW AND** **REQUEST FOR STAY**

INTRODUCTION

ConAgra Foods, Inc., ("ConAgra"), and Monfort, Inc., together hereinafter referred to as ("Petitioners"), pursuant to Cal. Water Code § 13320 and Title 23, California Code of Regulations § 2050–2068, hereby respectfully request that the State Water Resources Control Board ("State Board") exercise its authority to review Cleanup and Abatement Order No. R5-2005-0141, ("CAO") issued by the Regional Water Quality Control Board, Central Valley Region ("Regional Board") on October 21, 2005. In addition, pursuant to Cal. Water Code § 13321, Petitioners request that the Board grant a stay of the above referenced CAO pending the outcome of this appeal.

Petitioners, by and through their attorneys, for their Petition to the State Board, provide the following in accordance with Cal. Water Code § 13320 and Cal. Code Regs. Title. 23, § 2053. Petitioners may amend their Petition with further evidence, argument, and authorities as appropriate.

I. PETITIONERS

The Petitioners are ConAgra Foods, Inc. and Monfort, Inc. The contact person for this Petition is:

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II. ACTION TO BE REVIEWED AND RELIEF REQUESTED

Petitioners are seeking review of the CAO issued by the Regional Board. Petitioners request the State Board grant a Stay of the CAO while it determines whether to review, vacate, remand or revise the CAO which requires Petitioners to undertake the investigation and remediation of this Site. Petitioners' Petition is based on the following fundamental flaws in the CAO:

1) The Petitioners were not granted a fair Hearing in that among other things, the Petitioners were granted only 20 minutes and were prevented from distributing evidentiary summaries to aid the Regional Board's understanding of soil and groundwater data.

2) There were prejudicial abuses of discretion, as set forth in Nos. 3 through 8 below, in that the Regional Board did not proceed in the manner required by law; the CAO is not supported by the findings; and the CAO is not supported by the evidence.

3) The CAO erroneously names the Petitioners as dischargers.

4) The CAO fails to name appropriate responsible parties.

5) The CAO erroneously claim Petitioners have assumed the liability of prior owners and operators at the Site.

6) The CAO is based on inaccurate and incomplete information resulting in a CAO that reaches inappropriate and invalid conclusions.

7) The CAO ignores irrefutable evidence that the source of groundwater contamination is migration from upgradient source(s).

8) The proposed investigation and remediation plan is impractical, to some extent impossible, and far exceeds the Regional Board's mandate. Petitioners have no access to the Site.

III. DATE OF ACTION FOR WHICH REVIEW IS SOUGHT

The CAO was issued October 21, 2005, a copy is attached hereto and marked as Exhibit 1.

IV. STATEMENT OF THE REASONS THE ACTION WAS INAPPROPRIATE AND IMPROPER

A. Brief Factual Summary

The CAO Site is known as the Dixon Business Park and occupies approximately 50 acres easterly of North First Street and westerly of a Union Pacific Railroad Easement in Dixon, Solano County, California. The irregularly shaped business park property is divided into 10 lots, approximately half of the property has been developed with concrete buildings, parking lots and related structures. The area developed [Figure 1] sets atop the old settling ponds which Petitioners closed out with the Regional Board's blessing.

The Site was used for hog farming and dairy operations between approximately 1918 through 1935. In 1935, a slaughter-house and meat-packing plant was constructed on the Site operated by Mace Meat Company. Wastewater ponds related to this facility were constructed in approximately 1953. Armour Food Company acquired the packing facility in approximately 1958. In December of 1983, CAG Subsidiary, Inc. acquired certain assets, but **NOT** the liabilities of this Site [Attached to Petitioners April 15, 2003 Submission.] Monfort occupied the Site from 1987 until the operations closed in 1988.

In 1989, Monfort sold the property "as is" to William H. McLaughlin n/k/a Dixon Commercial Properties (hereinafter jointly referred to as "Dixon") for $2.1 million. [Exhibit 1 to Petitioners April 28, 2005 Submission.] Monfort financed $1.5 million of the purchase price. In September of 1994 Monfort, ConAgra and CAG Sub entered into a Settlement Agreement [Attached to Petitioners April 15, 2003 Submission] with Dixon whereby Monfort excused $1.2 million of the debt with Dixon in exchange for Petitioners complete release from the Site for all matters, including environmental. Dixon now wants to keep that $1.2 million, breach it's Settlement Agreement, and not use those funds for their intended purpose, i.e. environmental matters at this Site.

Petitioners have already cleaned up contamination at the Site. First it was the underground storage tanks of others at the Site. Then, in 1989 and 1990 sludge and soil was removed from the settlement ponds at the same time groundwater sampling was conducted, all as part of the closure requirements for the settlement ponds. In 1990 staff for the Regional Board reviewed all of the available data surrounding Petitioners closure of the settlement ponds and in a letter to Petitioners stated that the source of nitrates was gone. [Exhibit 2, Page 10: Lines 17-25.]

Petitioners, since closing the ponds, have had no connection to the Site until they were sued by Dixon, in the Superior Court for the State of California in and for the county of Solano, Case No. FCS022032, again seeking again to avoid its responsibilities. Dixon, unable in Court to obtain its desired result of continuing to avoid its responsibilities at this Site and to keep the $1.2 million earmarked for such projects, has now sought the assistance of the Regional Board.

Because of the lawsuit, Petitioners tried one more time to appease Dixon and the Regional Board. In 2004, the Petitioners participated in a groundwater investigation of the Site. The work plan was submitted to the Regional Board for comment, but it failed to respond. [Exhibit 1, Paragraph 17.] Petitioner's groundwater investigation confirmed that the background

levels of nitrate are significantly higher entering the Site than when it exits the Site. Similar results were confirmed for TDS.

B. The CAO Fails To Identify The Appropriate Responsible Parties

The CAO admits, in paragraphs 1-10, that Mace Meats owned and operated the Site for 23 years, or until 1958, at which time Armour and Company acquired the Site and continued operations through December of 1983. Yet neither Mace Meat Company nor Armour Food Company nor their successors are named as Responsible Parties at this Site. Nor, are the owners and operators of the hog farm or dairies that existed on the Site from 1918 until 1935. Further, in the face of irrefutable evidence that the nitrates in the groundwater entering the Site (likely the result of heavy fertilizer use) is much greater than when it exits the Site, has failed to name any agricultural entities as Responsible Parties whom are upgradient of the Site.

Neither ConAgra or Monfort are appropriate parties to this CAO in that there is absolutely no evidence in this record, or adduced at the Hearing, that Petitioners: "caused or permitted, any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the State and creates, or threatens to create, a condition of pollution or nuisance." In fact, the irrefutable evidence shows that nitrates entering the property far exceed nitrates in groundwater exiting the property. Even if there was evidence that Petitioners discharged or deposited waste, where it might be discharged (which there is not) there is nothing being discharged into the waters of the State. As shown on Figure 2, wells GW1 and GW2, punched at the very edge of the upgradient property lines, are the perfect background wells. Why? Because there have been **no** operations at this Site for over 17 years. Clearly any groundwater currently being sampled and tested in GW-1 and GW-2 is water migrating onto this Site from up gradient sources. As evidenced by MW-2, nitrate levels are slowly decreasing as the groundwater migrates under the property, until as it exits (MW-3, MW-4 and GW-4) the

nitrates are far less than when it enters the Site, and in some instances dramatically lower by several magnitudes. A similar pattern exists for TDS.

C. The CAO Is Premised On Faulty, Incomplete And Inaccurate Factual Information

Paragraph 4 of the CAO, despite submission of the Sale Agreement and the Regional Board's own diagram [Attachment 2 to Exhibit 1], the CAO provides that "all assets and liabilities of the Armour Food Company were purchased by CAG Sub Inc. Paragraph 5 the CAO implies that CAG Sub Inc and ConAgra continued to operate the business of Armour Foods and to use its brand names. Finally, paragraph 8 of the CAO erroneously states "ConAgra Foods Inc. is a successor to Armour Food Company."

Since CAG Sub Inc, ConAgra nor Monfort ever assumed any liabilities at this Site, Petitioners can only assume that these intentional misstatement of the facts is an attempt by the Regional Board to justify how it can issue this CAO to Petitioners, with absolutely no proof that it ever caused or permitted...."any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the State...." Recall also that for the past 90 years this Site has been devoted to agricultural, be it by animals or crops with heavy use of fertilizer. Despite this 90 year history, the Regional Board seeks to place the burden, without any proof, on the Petitioners for their four year involvement at this Site.

D. 2004 Investigation

The CAO admits that Petitioners participated in 2004 in the further investigation of this Site. Petitioner's Work Plan was submitted to the Regional Board [Exhibit 5 attached to Petitioners April 28, 2005 Submission] who chose to ignore Petitioner's request for comments, and did not respond. Nevertheless two well respected consultants, drilled, sampled and tested groundwater at the Site. The resulted of that investigation confirm that nitrate in the groundwater entering the property is far greater than (confirmed by three monitoring wells) when

it exits the Site. [Figure 2].

Besides ignoring the above report, the Regional Board ignores numerous studies that elevated levels of nitrate and TDS have been, and continue to be a problem not only in the Dixon area, but throughout the entire Central Valley Region. For example, Exhibit 7 to Petitioners' April 28, 2005 Response to the Regional Quality Board identifies over 30 public wells in and around the Site. Review of that analytical data indicates that nitrates and TDS concentrations consistently test well above Water Quality Objectives. In addition, the Basin Plan for the Central Valley Region, acknowledges that agriculture is a major contributor to both nitrates and TDS in groundwater throughout the Central Valley Region. For example, the Basin Plan [Exhibit 8 attached to Petitioners April 28, 2005 Submission], provides in part:

a) Tile drain installation may result in TDS concentrations and drainage water many times greater than in the irrigation water that was applied to crops. [Basin Plan Section IV – 2.00.]

b) Nitrate and other contaminants exceeding the State Drinking Water Standards occur extensively in groundwater in the basins, and public and domestic supply wells have been closed because of nitrates and other contaminants in several locations. [Basin Plan Section IV – 2.00.]

c) Since 1980 over 200 municipal supply wells have been closed in the Central Valley because of nitrate levels exceeding the State's 45 mg/l Drinking Water Standards. [Basin Plan Section IV – 2.00.]

The Basin Plan's findings are confirmed by Petitioner's subsequent groundwater report. That report shows conclusively that upgradient levels of nitrates in the groundwater are higher entering the property than exiting. TDS results are essentially the same. Such data compels the

inescapable conclusion that there is an off-site upgradient source of nitrates and TDS [Exhibit 6 to Petitioners April 28, 2005 Submission; and, Figure 2.]

E. The Required Action Of The CAO

The required action(s) of the CAO include: a well survey; a site assessment; a health risk assessment; a feasibility study, a clean up plan; groundwater monitoring; and other general requirements. All these costly measures far exceed what the Regional Board requested of the Petitioners at the Hearing. [Exhibit 2, Page 43, Lines 13-25; Page 44, Lines 1-3]:

> "Dr. Longley: .... I am not convinced that on the argument, I didn't find convincing argument that GW-1 and GW-2 can be considered as sufficiently upgradient to be qualified or be characterized as background.....obviously, if it can be shown that something that is far enough upgradient to be fully construed as a background well, the nitrates are high, that is going to influence what happens on site. If it turns out that what is reflected in other wells are significantly upgradient is at the level support what we are finding in MW1, then obviously that paints another picture."

If all the Board truly wanted was two "sufficiently upgradient" background wells, why did the CAO not begin with that as the preferred remedy, and if in fact that requested data was sufficient to appease the Regional Board, then those several wells could be punched, sampled and tested relatively inexpensively. Instead the staff in drafting the CAO ignored the Regional Board's request, and instead drafted the CAO seeking an overreaching, burdensome plan costing hundreds of thousands of dollars, on a Site that Petitioners have no access, and, as evidenced by Figure 1, most of which is already developed or "capped".

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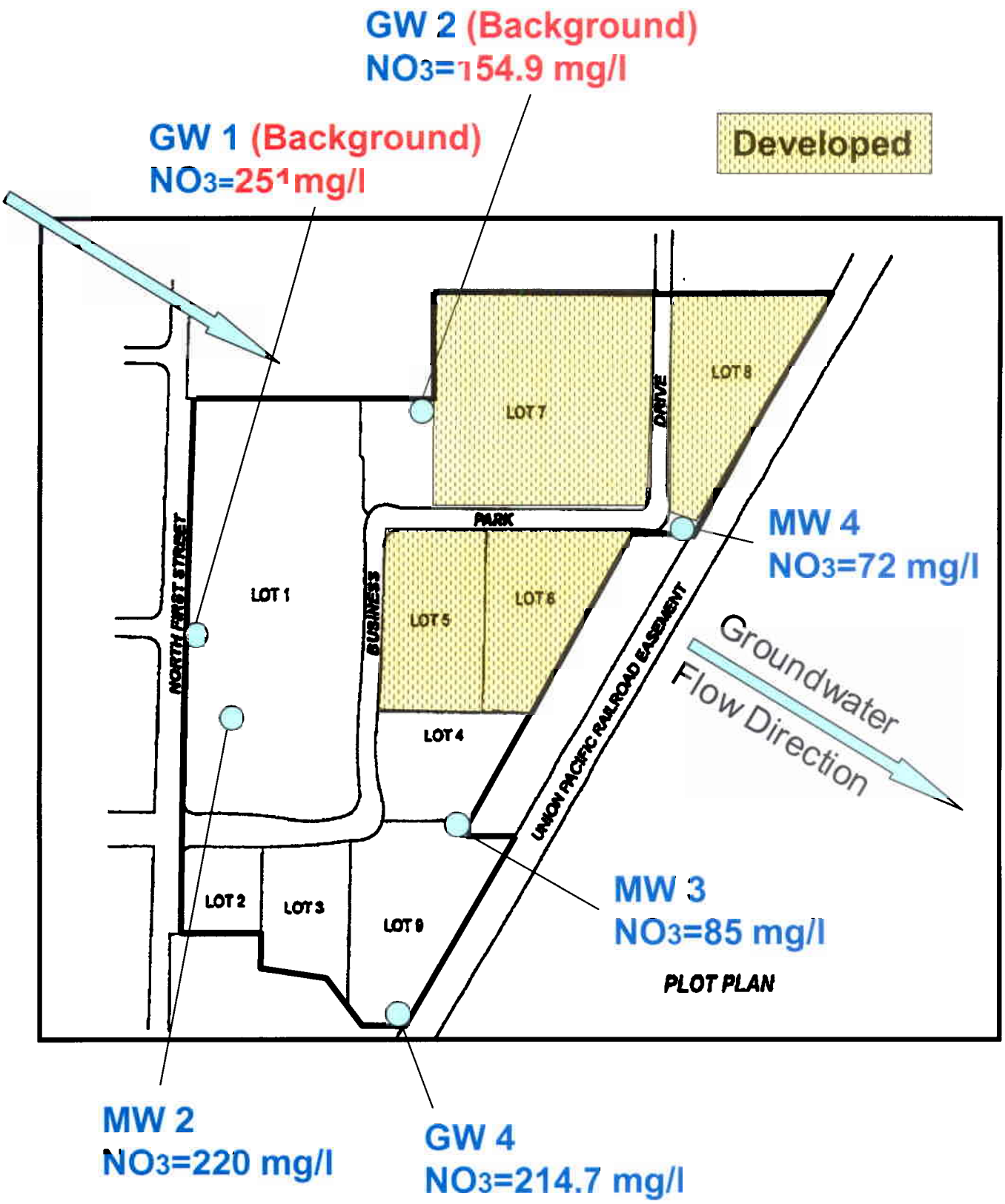
PENGAD 800-631-6989

FIGURE 1

PENGAD 800-631-6989

FIGURE 2



Source: Additional Characterization Of Extent of Nitrates prepared by Raney Geotechnical dated 8/12/04

V. HOW THE PETITIONER WAS AGGREIVED

The Regional Board issued the CAO without naming the truly responsible parties, even though the Regional Board was well aware of their existence. Petitioners have been named, with a record totally void of any evidence that they have: "caused or permitted any waste to be discharged or deposited where it is or probably will be, discharged in the waters of the State and create or threaten to create a condition or pollution or nuisance." The Regional Board ignored irrefutable evidence that the level of nitrates in the groundwater entering the property from upgradient sources exceeds any nitrate levels in the groundwater exiting the property. This fact alone makes it impossible for the Site to discharge any contaminates in to the groundwater thus creating a condition of pollution or nuisance. Similar data exists for the TDS levels.

The CAO further makes erroneous assumptions that Petitioners have somehow assumed the liability of all predecessors from time in memorial until 1984 and for all things that have occurred since the closure in 1988.

Finally the Regional Board, unable to totally ignore the overwhelming evidence of upgradient contamination concedes that only several monitoring wells a little farther upgradient would negate the necessity for any further investigation or remedial action at this Site.

Thus, the underlying premise supporting the CAO are erroneous and led to the issuance of a CAO that is factually inaccurate; that ignores irrefutable evidence; that has failed to name the true responsible parties; has wrongfully named Petitioners; and, seeks a remedy that is not only impractical, but in part impossible to perform and one that is contrary to the Regional Board's findings.

VI. ACTION THE PETITIONER REQUESTS THE STATE BOARD TO TAKE

Petitioner's request the State Board: grant a Stay of the CAO; vacate the CAO as it pertains to the Petitioners; revise the CAO to include the correct responsible parties; correct the

numerous factual errors and inaccuracies in the CAO; or, revise the remedy to allow for simply drilling the additional background wells as the Regional Board requested.

Alternatively, Petitioners request the State Board remand the CAO to the Regional Board and direct the Regional Board to: vacate the CAO as it pertains to the Petitioners; revise the CAO to include the include the correct responsible parties; correct the numerous factual errors and inaccuracy in the CAO; and revise the remedy to simply drill the additional background wells the Regional Board requested.

VII. STATEMENT OF POINTS AND AUTHORITIES FOR LEGAL ISSUES

A. Petitioners are not Water Code § 13304 Dischargers.

The Regional Board may issue § 13304 Cleanup and Abatement Orders to any person "who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited or it is, or probably will be, discharged in the waters of the State." (Water Code § 13304, Subd (a).) Persons subject to this provision are designated as a "discharger" which is defined as "any person who discharges waste which could affect the quality of waters of the State." (Cal. Code Regs. Title 23, § 2601.)

Accordingly, if the Petitioners are to be dischargers, there must be evidence established to prove that Petitioners have caused or permitted waste to be discharged; that those wastes are deposited where they will or probably will discharge into the waters of the State; and that waste must affect the quality of the waters of the State.

There exists no evidence in this record that the Petitioners: caused or permitted waste to be discharged; discharged or deposited waste that is, or probably will be, discharged into the waters of the State; or discharged wasted which could affect the quality of the waters of the State of California. As evidenced in Figure 2, nitrates entering the property are significantly higher than when exiting. Thus nothing from the Site (or the alleged waste thereon), is being

discharged into the waters of the State. But even if that were true, this phantom waste is not affecting the quality of the groundwater.

The significance of the foregoing is echoed by Resolution No. 92-49, the Policies and Procedures for investigation for Cleanup and Abatement of discharges under Water Code § 13304. This Resolution requires the waste to be cleaned up to background, or if that is not reasonable, to an alternative level that is the most stringent level that is economically and technologically feasible in accordance with Title 23, Cal. Code of Regulations, § 2550.4. At this Site, if Petitioners are required to cleanup to background, there is no cleanup necessary, in fact the Petitioners would have to add pollution to the groundwater to get it to rise to the level of background as reflected on Figure 2.

B. Additional parties should be added to the CAO.

Evidence clearly indicates that properties upgrading of the Site have and continue to contribute to the high nitrates and TDS at the Site and in the groundwater below. Thus additional upgrading landowners should be named as responsible parties.

Mace Meats Company and Armour Food Company and their successors and assigns should be named as parties to this CAO. The State Board has made clear, parties are to be named for cleanup at the Site if there is "credible and reasonable evidence which indicate the named party has responsibility." In the Matter of the Petition of Exxon Company, Order No. WQ85-7 at paragraph 17 (1985). This is consistent with the State Board's prior holdings that "to the extent possible, we believe that multiple parties should be properly named in cases of disputed responsibility", In the Matter of the Petition of US Cellulose, Order No. WQ92-04, paragraph 4 (1992).

C. The CAO is so factually inaccurate that it cannot support its issuance.

The Regional Board "must set forth findings to bridge the analytical gap between raw evidence and ultimate decision or order." Topanga Association for a Scenic Community v. County of Los Angeles, 11 Cal. 3rd 506, 515 (Cal. 1971). In this CAO, the Regional Board has failed to meet this findings requirement. As set forth repeatedly, the CAO time and time again, contradicts itself and contains numerous unsupportable facts and conclusions.

The CAO claims that the Site is contributing to groundwater contamination. It reaches this conclusion by misinterpreting certain data; totally ignoring historical data for the entire surrounding area; and, specifically test results from upgrading wells GW1 and GW2. Petitioners relied on two highly qualified expert independent consultants who selected the drilling locations for GW1 and GW2. Thus, the CAO does not cite to any reports or other documents to explain how or why the Regional Board ignored the historically extremely high levels of nitrates and TDS in this entire area; why it ignored the data from background wells GW1 and GW2; why known and readily discoverable parties were not named as PRPs; and why the remedy of the CAO far exceeds the Regional Board's stated remedy that there be simple confirmation of the existing upgradient contaminants.

VIII. COPY OF PETITION SENT TO REGIONAL BOARD

A copy of this Petition and its attachments have been sent to the Regional Board. By copy of this Petition and pursuant to Cal. Code Regs. Title 23, § 2050.5, Petitioners hereby request the Regional Board to prepare and file the Administrative Record.

Additionally, by copy of this Petition, Petitioners have provided notice of this Petition to all parties to the Regional Board Hearing.

Attached as Exhibit 2 is a transcript of the Hearing.

IX. STATEMENT OF ISSUES PRESENTED TO REGIONAL BOARD

All substantive issues raised in this Petition were raised before the Regional Board

through filings, submissions, comments, or during the Hearing.

X. REQUEST FOR HEARING AND SUBMISSION OF ADDITIONAL EVIDENCE

Petitioners respectfully request a Hearing before the State Board to present evidence and legal argument in support of its claim. Petitioners anticipate additional evidence supporting this Petition may become available in the near future. Petitioners will amend this Petition and submit any additional evidence consistent with the requirements of 23 CCR § 2050.6.

PETITION CONCLUSION

Petitioners are seeking review of the CAO issued by the Regional Board. Petitioners request the State Board please stay, review, vacate, remand or revise the CAO as previously described herein.

XI. REQUEST FOR STAY OF ENFORCEMENT

A. The State Board has power to Stay Regional Board actions.

Pursuant to Water Code Section 13321, and 23 C.C.R. § 2053 (b), Petitioners request a Stay of the CAO and any additional Regional Board, requirements that are or may be directed toward Petitioners, during the dependency of this Petition.

The Request for the Stay of Enforcement is that the proper parties, the true facts and the appropriate remedy should be determined before any work is begun. The CAO admits that it should have named additional parties, but it failed to do so. To compound this problem, the Regional Board is requiring the Petitioners to conduct the work even though they are not the proper parties; they do not have access to this Site; and that the CAO is not supported by the facts or the law.

B. Substantial Harm to Petitioners if Stay is not granted.

Petitioners will suffer substantial harm if a Stay is not granted because:

1) Petitioners do not own nor have access to the Site.

2) Petitioners were involved with the Site for only 4 out of the more than 90 years the Site has been used for agricultural purposes. Petitioners should not be required to shoulder the burden of investigation and cleanup despite the fact that other existing responsible parties are known, and in a financial position to perform and/or participate in the investigation and cleanup.

3) Petitioners are required by December 1, 2005 to: submit the results of a well survey within ½ mile of the Site together with a sampling plan for those wells; submit a Site Assessment Work Plan concerning soil and groundwater sampling; investigate two former on-site water supply wells (which were destroyed by the current owners); and submit a Public Participation Plan. Please keep in mind all the Regional Board requested at the Hearing was confirmation of the upgradient sources of contamination. Thus, Petitioners, by merely exercising their statutory right of appeal, risk substantial civil penalties per day if they do not comply with and submit the above-referenced items, which are due literally days after the time to file this appeal runs. Therefore a Stay of Enforcement of the CAO is absolutely necessary while Petitioners perfect their Appeal from the CAO.

C. Substantial questions of fact and law exist in the Petition.

Substantial questions of fact and law are of issue in this Petition, including but not limited to:

1) The Petitioners were not granted a fair Hearing in that among other things, the Petitioners were granted only 20 minutes and were prevented from distributing evidentiary summaries to aid the Board's understanding of soil and groundwater data.

2) There were prejudicial abuses of discretion as set forth in Nos. 3 through 6 below in that the Regional Board did not proceed in the manner required by law; the CAO is not supported by the findings; and the CAO is not supported by the evidence.

3) The CAO erroneously names the Petitioners as dischargers.

4) The CAO fails to name appropriate responsible parties.

5) The CAO erroneously claim Petitioners have assumed the liability of prior owners and operators at the Site.

6) The CAO is based on inaccurate and incomplete information resulting in a CAO that reaches inappropriate and invalid conclusions.

7) The CAO ignores irrefutable evidence that the source of groundwater contamination is migration from upgradient source(s).

8) The proposed investigation and remediation plan is impractical, to some extent impossible, and far exceeds the Regional Board's mandate. Petitioners have no access to the Site.

D. Lack of substantial harm to other interested persons and the public interest if the Stay is not granted.

There will be no substantial harm to other interested persons or the public interest if the Stay is granted in that:

1) The area of concern i.e. the former settling ponds, were properly closed with the Regional Board's blessings, and are currently "capped" by parking lots and buildings.

2) As shown in the Basin Plan for the Central Valley Region, the entire region is cursed with levels of nitrates and TDS that exceed existing standards.

3) Irrefutable evidence exists that the contamination in the groundwater below this Site is from an upgradient off-site source.

4) The requested remedy is far in excess of what the Regional Board requested.

5) The sole reason stated by the Board for the issuance of this Order [Exhibit 2, Page 15, Lines 7-10] is:

"The adoption of this Cleanup and Abatement Order would require the investigation and cleanup of the pollution, would promote settlement among the parties, and would facilitate the economic development of this Site."

The Board admits there is no threatened harm to the public. Its sole concern is the economic development of the property which can surely wait for a few additional days while Petitioner is allowed to pursue its due process rights of correcting the inaccuracies, inconsistencies and unfairness of the existing CAO.

I DECLARE UNDER PENALTY OF PERJURY that the facts set forth in the above Request for Stay of Enforcement is based upon my personal knowledge of the facts.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the above and foregoing Petition for Review was forwarded to the following by United States mail on the 21 day of November, 2005.

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